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PRINCIPAL AND SURETY — ALTERATION IN POSITION OF SURETY.

The law of principal and surety has given rise to a great number of decisions, of which one of the latest is the case of *Rainbow v. Juggins.* [1] That case was tried before Mr. Justice Manisty without a jury, and was reserved for further consideration. The action was brought to recover the amount of a joint and several promissory note, dated the 17th Feb. 1876, signed by P and the defendant to secure the repayment to the plaintiff on demand of £400 advanced and lent by her to P out of her separate estate, with interest. The defendant pleaded that he was only a surety for P; that it was part of the arrangement whereby he became surety that P. should deposit with the plaintiff, as collateral security for the debt, a policy of insurance for £250 on the life of P, which had been effected by him on the 7th Nov. 1866; that the policy was so deposited. P was subsequently adjudicated a bankrupt, the amount due upon the promissory note remaining unpaid. The plaintiff thereupon proved against his estate for the full amount due to her, but neglected to set a value upon the insurance policy, which she held as part security for the repayment of the loan, although her solicitor was warned by the defendant's solicitor that if she did not put a value upon it the effect would be to release the defendant from his obligation as surety for the payment of the promissory note. The Court of Bankruptcy ordered the policy to be given up to the trustee in bankruptcy for the benefit of the creditors. The defendants accordingly contended that by not valuing the policy, and thereby losing the benefit of it, the plaintiff had so far altered the position of the defendant as to discharge him in point of law from his liability as surety.

The decision of the Queen's Bench Division in Polak v. Everett [2] was quoted on behalf of the defendant. A wine merchant was indebted to the plaintiffs in sums of £5,000 and £3,400. By an agreement entered into the 20th December, 1873, the debtor undertook to pay to plaintiff £2,400 in cash, and also to transfer to them £6,000 in fully paid-up shares in a limited company, into which it was proposed to turn the company. The shares were to be redeemed at par within twelve calendar months from the 1st of January, 1874. Certain book debts which were due to the debtor were to be collected by A, and a moiety of the proceeds was to be applied to the redemption of the shares at par. The defendant guaranteed the fulfilment by the debtor of the agreement, so far as concerned the full redemption of the shares. A was unable to collect more than £400 of the book debts. The company, however, did not consider it to their interest that the customers should be pressed, entered into agreements with the debtor and the plaintiff for the transfer of the book debts for a sum of £1,200. This agreement was confirmed at a meeting of the company, at which the defendant, the company's chairman, was present. But he did not consent to the bargain. The nominal value of the book debts was £8,000. The present proceedings were taken with the object of making the defendant liable for £2,000, balance of the £6,000, after allowing the full nominal value of the moiety of the book debts. The court ordered judgment to be entered for the defendant. "It has been established from Rees v. Berrington" [3] said Mr. Justice Blackburn, "down to the present time that a surety is discharged by the creditor giving time to the principal debtor, because he deprives the surety of part of his right which he could have had against the debtor—to use the creditor's name to sue, for instance; and, though it actually benefits the surety, still by principles of equity it discharges the surety entirely." The reason for this was stated by Lord Eldon [4] to be that the surety can not have the same remedy as he would have had under the original contract. In the present case no time had been given, "but," his lordship went on to say, "there has been an equal interference with the equitable right of the surety—the right to have these shares paid off in

[1] 42 L. T. Rep. N. S. 88.
[2] 34 L. T. Rep. N. S. 128.
[3] 2 W. & T. L. Cas. 974.
[4] Gumnell v. Howarth, 3 Mer. 278.

a certain way, and of that right he has been deprived by the release of the book debts." That act, he thought, was a wilful one, and therefore within the authority of Mayhew v. Crickett. [5] It was argued by counsel that, if the whole amount of the book debts in question had been paid off, a balance would still remain, and that balance could not be affected by such payment. His lordship, however, was of opinion that, once the rule is conceded that where the creditor interferes with the rights of the surety and alters those rights even for his benefit, that discharges the surety, it must apply equally to the whole security and to any part thereof. Mr. Justice Mellor thought the rule that the creditor has no right to consider whether what he does is for the surety's benefit or not rested on very high grounds, the question being simply one of contract, by whose terms the parties were bound.

In the above case it was taken as admitted that laches of itself does not discharge the surety, and the case of Wulff v. Jay [6] was distinguished on the ground that the creditor there was in equity in the position of a mortgagagee, bound to account for moneys that should have been in pledge.

A material alteration of the terms between the creditor and the principal debtor will, of course, discharge the surety. In General Steam Navigation Company v. Rolt, [7] B contracted to build a ship for A. The price was to be paid by instalments. C became surety for the due performance of the contract by B. A allowed B to anticipate the greater part of the last two instalments, and the Court of Common Pleas held that C was discharged, because the original contract had been materially altered. Chief Justice Cockburn thought it was clear that A had made a payment on account of the instalment of the contract price before the completion of the work which was to entitle B to receive the money, and by so doing prejudiced the position of the surety, who lost, by that anticipatory payment to the principal, the strong inducement which otherwise would have operated on his mind to induce him to finish the work in due time.

In Calvert v. London Dock Company, [8] A, a builder, contracted to perform certain works for the London Dock Company, and it was agreed that three-fourths of the work, as finished, should be paid for every two months, and the remaining one-fourth upon the completion of the whole work. Lord Langdale held that the sureties for the due performance of the contract were released from liability by reason of payments exceeding three-fourths of the work done having, with the consent of the sureties, been made to the contractor before the completion of the whole work. "In almost every case," said his lordship, "when the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended that what was done was beneficial to the surety, and the answer has always been that the surety himself was the proper judge of that, and that no arrangement different from that contained in his contract is to be forced upon him; and bearing in mind that the surety, if he pays the debt, ought to have all the securities possessed by the creditor, the question always is, whether what has been done lessens that security."

That a surety has a right to insist upon the literal performance of the original contract is a proposition fully supported by Whitcher v. Hall. [9] If a new bargain is made he has a right to exercise his judgment whether he will become a party to it. The fact that little difference exists between the two contracts is not material; the question is, whether the contract performed by the plaintiff is the orignal contract to which the other was a party.

There are, however, cases in which a surety again may be discharged by the laches of the creditor, *i. e.*, if he omits to do something which he was bound to do for the protection of the surety. Thus in Philips v. Astling, [10] where A and B were sued on a guarantee to secure payment of a bill by the drawers or acceptor. The blil was dated 10th Jan. 1808. It was not presented for payment when it became due. Two days afterwards notice that it remained unpaid was given to the drawers, but no notice to the defendant A. Payment was not demanded of A until the drawers and the acceptor had become insolvent, which was

[5] 2 Swans. 191.
[6] 27 L. T. Rep. N. S. 118.
[7] 6 C. B N S. 550.
[8] 2 Keen 638.
[9] 5 B. & C. 269.
[10] 2 Taunt. 206.

some time after the bill became due. The court held that the sureties were not liable. It was agreed in Watts v. Shuttleworth,[11] between the plaintiff and the principal debtor that the plaintiff should insure from risk by fire the work which the principal debtor was doing for him. The defendant was informed of this term of the agreement when he became surety for the due performance of the work. He was held to be discharged by the plaintiff's omission to insure.

In Perfect v. Musgrave,[12] one Sowden had kept a banking account with the plaintiffs. In 1811 they required security from him when he deposited with them certain title deeds, and prevailed on the defendant to join him as a surety in a promissory note of £400 at twelve months after date, which he gave them Soon after that note became due Sowden and the defendant gave the plaintiffs another joint note at twelve months after date, in exchange for the note which had become due, and Sowden still continued to keep a running account with the bank, and in the course of that year paid in a very large sum. In January, 1815, Sowden compounded with his creditors, including the plaintiffs, at 10s. in the pound. The defendant in the meantime never heard anything of the note. In 1816 one Slater demanded payment of the note, as holder, from the defendant, and several months afterwards the plaintiff brought this action. Baron Wood ruled that there was no defense to the action, and a rule for a new trial was discharged. In Curry v. Edensor,[13] a broker, on purchasing goods for his principal, agreed for a percentage to indemnify him against any loss on a resale, and the court held that the undertaking was discharged by the fact of the principal having had a fair opportunity of selling to advantage of which he neglected to avail himself, and that the broker was not liable on a subsequent re-sale at a loss .Similarly if a person agree that on being allowed a commission he will indorse a bill to be given for goods to be supplied to a third party, the liability to indorse the bill does not arise unless the creditor tender it to the surety for his indorsement within a reasonable time.[14]

[11] 7 H. & N. 353.
[12] 6 Price, 111.
[13] 3 L. R. 524.
[14] Payne v. Ives, 3 D. & R. 664.

In *Rainbow v. Juggins*, Mr. Justice Mainsty thought that at the most the case was one of neglect or omission to put a value upon the policy, assuming that it had some value when the debt was proved, and that the defendant was discharged from his liability as surety only to the extent of the value of the policy. That this case is distinguishable from Polak v. Everett, is beyond doubt; nevertheless the authorities upon this branch of the law of principal and surety are not as clear as is desirable.

THE OWNERSHIP OF A CORPSE BEFORE BURIAL—I*

The disposition of a human body after death generally follows the desires of the person as expressed in life, to be carried out by the relatives of the deceased. How far custom and laws will interfere and control these desires even when known, make many complicated and diverse questions not easily to be determined by any tribunal. In order to do this we must resort to the ecclesiastical or church law for some precedents and guides, as well as to the common law and the special statutes of a particular State. The only question which will be considered in this connection is: Who has the sacred and inherent right to the custody of a dead body in order to properly bury it, and to be protected in that right?

It has been decided by the Supreme Court in Pennsylvania that, at common law, it is the duty of the executor to bury the deceased, and in a manner suitable to the estate he leaves behind him. 2 Black. Com. 508; Wynkoop v. Wynkoop, 42 Pa. St. 295. Extravagance, however, in the funeral expenses may amount to a devastation of the substance of the deceased, for which the executors or administrators will be alone answerable, and will not prejudice the rights of legatees or creditors of deceased. 2 Black. Com. 508. It has been held in Massachusetts that the executor must bury the deceased. Hapgood v. Houghton, 10 Pick. 154; Williams on Ex. 829. As to the manner and form of the burial it may reasonably be said that the executor should obey the expressed reasonable wishes of the testator as to the disposition of the remains, even if it is not in accordance with the wishes of the next of kin. Estate of Benison, 31 Leg. Int., 196. It generally happens, however, that the corpse is at the disposal of the relatives of the deceased. Yet it has been held by the English Ecclesiastical Courts, and also other courts, that at common law there can be no property in a corpse. Coke's Inst. 202; 2 Black. Com. 429; 4th do. 235. Coke says a corpse is *nullius in*

*The substance of this article is taken from a paper on the Law of Burial read before the New York Medical Society on February 4, 1880, by R. S. Guernsey of the New York bar.

bonis. The same has been held by courts in this country. Meagher v. Driscoll, 99 Mass. 281; Pierce v. Swan Point Cemetry, 10 R. I. 227; Secor v. Secor, 31 Legal Int. 268; Matter of Brick Presb. Church, 3 Edw. Ch. 155. The law is established that a dead body is not property; but there are rights attached to a dead body — rights to care for it, watch over it and bury it — which the law will protect. Prentiss, J. 4 Am. Law Times, 129.

Where there is no expressed wish of a testator as to the disposition of his remains, the wishes of the surviving husband or widow shall control as against the next of kin. Durell v. Hayward, 9 Gray, 248; Wynkoop v. Wynkoop, 42 Pa. St. 293; Secor v. Secor, 31 Leg. Int., 268. A husband is bound to bury his deceased wife, and a wife must bury her deceased husband. Ambrose v. Kerrison, 10 C. B. 776; Chapple v. Cooper, 13 Mees. & W. 259; 1 H. Black. 90; Weld v. Walker, 1 Am. Law Rev., (N. S.) 57. The Supreme Court of Michigan has recently held in the case of Sears v. Gidday, 2 N. W. Rep. (N. S.) 367, that a husband's liability for the funeral expenses of a deceased wife is not affected by the fact that she left her property by will to another, and that person assisted in the arrangements and direction of the funeral. Even at common law a contract made by the wife for the burial of her husband will be enforced. It was done in the English Courts where the wife was an infant. Chapple v. Cooper, 13 Mees. & W. 259.

Under the common law it was held in England in Reg. v. Stewart, 12 Ad. & E. 773, 4 Eng. C. L. 773, that the duty of seeing to the providing for the funeral and of carrying to the grave the dead body, rests upon the person under whose roof the death takes place. He cannot keep the body unburied, nor he cannot cast it out so as to expose the body to violation or to offend the feelings or endanger the health of the living, nor can he do anything which prevents Christian burial. It has been held in Maine (Kavanan's Case, 1 Greenl. 226) that the throwing of a dead body in a river is indictable at common law. In this case it was the body of a newly born infant. The court said that it must be buried.

In regard to the legal right to have the body cremated, either at the request of deceased or by the next of kin of deceased, if it is done it must be in a decent manner and not outrage the public sense of propriety. If it outrages the public sense, an indictment at common law will undoubtedly stand against the perpetrators.

Where there is any property left by deceased, the funeral expenses must be paid in preference to any of the debts of deceased. 3 Coke's Inst., 202; 2 Black. Com. 508: Patterson v. Patterson, 59 N. Y. 584. Where the deceased has left any estate, the estate is liable for the funeral expenses to the person who paid them or furnished them. This was held in a case where the husband paid the funeral expenses of his wife; he was allowed them out of the estate. McCue, adm'r, v. Garvey. 14 Hun, 562. This is contrary to the doctrine held in the English Courts. Bertie v. Lord Chesterfield, 9 Mod. 31; Gregory v. Lochyer, 6 Mad. Ch. 63; Willeter v. Dobie, 2 Kay & J. 649. Where there is no property of deceased and no person whose duty it is to provide burial, the poor-rate commissioners of a parish will take the care and expense of the funeral if requested to do so. In the United States the charity commissioners of a town or city will do the same when necessary. Where, in the absence of the personal representative or the person bound to bury a dead body, or from the necessity of the case, another incurs the expense of a proper burial, he may recover it from the person or estate that was bound to do it. McCue, adm'r v. Garvey, 14 Hun, 562; Patterson v. Patterson, 59 N. Y. 583; Rappelyea v. Russell, 1 Daly, 214. It is here necessary to notice the decision of the Supreme Court of Indiana in Bogart v. City of Indianapolis, 13 Ind. 138, which held that the bodies of the dead belong to the surviving relations, in the order of inheritance, as property, and that they have the right to dispose of them as property within restrictions analogous to those by which the disposition of other property may be regulated. This never has been the law and never was thought to be so by any lawyer or court until the report of the referee, in 1856, to the Supreme Court, in New York City, in the matter of the widening of Beekman street. 4 Brad. Sur. 504. He asserted it in an *obiter* opinion which is full of errors of law and of fact, and will mislead those who look no further into the subject, in which report he censures Lord Coke and an unbroken line of numerous common law decisions of the English Courts for several hundred years, and claims that it is ecclesiastical influences which hold that a dead body is not property. The courts have always held, in this country, that there is no property in a corpse, following the English decisions. Pierce v. Swan Point Cem. 10 R. I. 227; Guthrie v. Weaver, 1 Mo. App. 136; State v. Doepke, 68 Mo. 208; Secor v. Secor, 31 Legal Int., 268.

In Ohio, in 1871, the court held that a husband could maintain an action and recover damages for maltreating the dead body of his wife under the following circumstances: The dead body of plaintiff's wife was delivered to the defendants, who were physicians, for the purpose of dissecting the throat. The defendants promised to perform the operation in presence of the friends of deceased and to give the body a decent burial. The defendants retained the body upon some pretext longer than was necessary, and afterwards, upon demand of deceased's friends, returned the body in a rough box to the friends of deceased. The husband, who had been absent from home, returned and brought suit for laceration of feelings, expense of recovering the body and for the fraud. The court held the action could be maintained and overruled a demurrer to the complaint. 4 Am. L. T. 127. The common law punished criminally a libel on the reputation of the dead. Com. v. Clap, 4 Mass. 168. The principle of this, undoubtedly is that to allow such acts without any legal remedy or punishment will tend to a breach of the peace between the relatives of the deceased and the libeler. Rex v. Topham, 4 Term, 127.

LANDLORD AND TENANT—ADVERSE TITLE.

LANSMAN v. DRAHOSS.

Supreme Court of Nebraska, March, 1880.

S, who was the tenant of certain premises under a lease from L, purchased the same at a judicial sale without surrendering his lease or notifying L who was absent at the time from the State. *Held*, that the purchase could not be sustained, but would be presumed to have been made to protect the interest of L, and that the latter might redeem.

Appeal from Cuming County.

Uriah Bruner, for appellant; *Crawford & McLaughlin*, for appellee.

MAXWELL, C. J., delivered the opinion of the court:

This case was before this court in 1879, and is reported in 8 Neb. 457. The plaintiff moves for a rehearing upon the ground that Sonneshine was the tenant of the plaintiff at the time he purchased the property in question, and that therefore he could not acquire an adverse title as against his lessor. No stress was laid upon this point in the former argument of the case, nor is the petition framed for the particular purpose of seeking to redeem from Drahoss and Sonneshine, the particular object aimed at being to require Mrs. Parrot to exhaust the other mortgaged property before selling that purchased by the plaintifi subject to the decree of foreclosure. The petition is very long, with the exhibits covering sixty-four pages. Much of it could have been stricken out, on motion, and thereby have made the petition more symmetrical. But, notwithstanding the want of form in the petition, all the facts, which are well pleaded therein, for the purposes of the action are admitted to be true.

The petition alleges, in substance, that on or about the first day of October, 1877, the plaintiff rented said lot six, in block nineteen, to the defendant Frederick Sonneshine, who entered into possession of said premises as said tenant, and as such tenant continued possession of the same until after the sale and confirmation thereof; that the plaintiff was absent from this State from the fifteenth of June, 1876, till about the fifteenth of January, 1878, and had no notice of said sale and confirmation thereof until a long time after the confirmation of the same; that said Drahoss and Sonneshine purchased said lot for the sum of $452, although it was worth the sum of $1,200 at that time, and is still of that value, and that they purchased said lot with the intention of defrauding the plaintiff; that they have been and are in possession of said premises, the rental value of which is about $10 per month. There is no prayer in the petition to redeem this lot from Drahoss and Sonneshine, the prayer upon that matter being to have their title declared void; but there is a general prayer "for such other and different relief as equity and the nature of the case may require." Drahoss and Sonneshine join in a general dem urrer to the petition, so that if there is a cause of action stated against either, the judgment must be reversed. Dunn v. Gibson, 4 N. W. R. 400; s. c. 9 Neb. 513.

As a general rule a tenant will not be permitted to deny the title of his landlord so long as the tenancy exists. But where the landlord's title has been extinguished, in an action for rent by the lessor, these facts may be shown as a defense. The relation of landlord and tenant can be created only by lease, either in writing or by parol. It is said that there is a tenure between lessor and lessee for years, to which fealty is incident by theory of law as well as of privity of estate between them. 1 Wash. Real Prop. 413; Thrall v. Omaha Hotel Co., 5 Neb. 300. And where the relation of landlord and tenant has been established it attaches to all who take through or under the tenant as assignee. In Mattis v. Robinson, 1 Neb. 3, one Mattis leased certain premises for one year, and after the expiration of the lease, but while holding over and while in possession of the premises acquired under the lease, he purchased a mortgage on the premises for one-half of its face value and commenced an action of foreclosure, thereby attempting to divest the title of his lessors. The court say: "The policy of the law will not allow a tenant to be guilty of a breach of good faith, in denying a title, by acknowledging and acting under which he originally obtained, and has been permitted to hold, possession of the premises. The lessee obtaining possession is estopped from keeping the land in violation of the agreement under which it was acquired."

The result of allowing a tenant to deny the title of his landlord is well illustrated in 2 Smith's Leading Cases, 657: "It is well known that a recovery can not be had in ejectment without proof of title, and that it may be defeated by proving an outstanding title in a third person. For a tenant, therefore, to be permitted to question or contest his landlord's title in an action of ejectment for the land, would be to take the estate from the latter and confer it on the former, wherever there was a defect, either in the title itself, or the proof brought forward to sustain it. This would obviously be equally inconsistent with public policy and private faith, and would prevent men from letting their property, even when they were unable to use it themselves. Good faith requires that the tenant shall not avail himself of the advantage given by his possession as against his landlord. Before assailing his landlord's title, he must put him in as good position as he was before the tenancy, by delivering up to him the possession." This doctrine was reaffirmed in Thrall v. Omaha Hotel Co., 5 Neb. 295. Judge Story says: "It may be laid down as a general rule that a trustee is bound not to do anything which can place him in a position inconsistent with the interests of his trust, or which may have a tendency to interfere with his duty in discharging it. And this doctrine applies not only to trustees, strictly so called, but to others standing in a like situation. Such assignees are solicitors of a bankrupt estate. * * * * It applies in like manner to ex-

ecutors and administrators." * * * * Story's Eq. Jur. § 322. "There are many other cases of persons standing, in regard to each other, in like confidential relations in which similar principles apply. Among these may be enumerated the cases which arise from the relation of landlord and tenant, of partner and partner, principal and surety, and various others, where various, where mutual agencies, rights and duties are created between the parties by their own voluntary acts or by operation of law." Id. § 323.

To permit a tenant who has obtained possession under a lease to acquire an adverse title to the premises during the existence of the lease, and to set up against his landlord without first surrendering the possession thus acquired, would, in many cases, permit him to divest the title of his landlord. Suppose the title of the landlord is possessory merely, can the tenant be permitted to divest this possessory title while his lease remains in force? We think not. In the case at bar the defendants purchased the premises during the existence of the lease without yielding possession of the premises, and without notice to their lessor. This being the case, it will be presumed that it was for the purpose of protecting the possession of the plaintiff. The petition, therefore, upon that question states a cause of action, for which the judgment of the district court is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

CORPORATIONS—ULTRA VIRES.

THOMAS v. WEST JERSEY RAILROAD CO.

Supreme Court of the United States, October Term, 1879.

1. The powers of corporations organized under legislative charters are only such as the statutes confer. Conceding that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others.

2. A lease by a railroad company of all its road, rolling-stock and franchises for which there is no express authority given in its charter is *ultra vires* and void.

3. The ordinary clause in the charter authorizing such corporations to contract with other transporation companies for the mutual transfer of goods and passengers over each other's roads, is no authority to lease its road and franchises.

4. The franchises and powers granted to such corporations are in a large measure designed to be exercised for the public good, and this exercise of them is the consideration of the public grant. Any contract by which the corporation disables itself to perform those duties to the public, or attempts to absolve it from their obligation without the consent of the State, is a violation of its contract with the State and is forbidden by public policy, and is, therefore, void.

5. The fact that the legislature, after such a lease is made, passes a statute forbidding the directors of the company, its lessees or agents, from collecting more than a fixed amount of compensation for carrying passengers and freight, is not a ratification of such lease or an acknowledgment of its validity.

6. Where in a lease of this kind for twenty years, the lessors have resumed possession at the end of five years, and the accounts for that period have been adjusted and paid, a condition in the lease to pay the value of the unexpired term is void, and the case does not come within the principle that executed contracts which were originally *ultra vires* shall stand good for the protection of rights acquired under a completed transaction.

In error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. Justice MILLER delivered the opinion of the court:

The plaintiffs in error entered into a contract on the 8th day of October, 1863, with the Milville and Glassboro Railroad Company of New Jersey, which, in the resolution of the board of directors by whom it was initiated, is called a lease of the road. This agreement was confirmed by a vote of the stockholders, and was to continue for a period of twenty years from the first day of April, 1863. It, however, contained a provision that the railroad company could at any time put an end to it upon three months' notice to the other party; but in that event arbitrators were to be chosen who should decide upon the value of the contract and the amount of damages incurred by and equitably and justly due to the other party by reason of such action. Under this provision the railroad company ended the contract and resumed possession of the road April 1, 1868. About this time, by acts of the New Jersey legislature, the Milville and Glassboro Railroad Company was consolidated with the West Jersey Railroad Company, which succeeded to all the rights and obligations of the former company, and the road was delivered by plaintiffs, on the first of April, 1868, to the latter. Efforts at arbitration, which it is unnecessary to recite here, having proved abortive, the plaintiffs in error brought the present action in the Circuit Court for the Eastern District of Pennsylvania to recover the value of the contract and the damages sustained by them by its termination under the clause of the agreement already mentioned.

The court held the contract void, and instructed the jury to find a verdict for defendants. This writ of error brings up the judgment entered on that verdict for review.

The ground on which the court so held, and on which the ruling is supported in argument here, is that the contract amounted to a lease, by which the railroad, rolling-stock and franchises of the corporation were transferred to plaintiffs, and that such a contract was *ultra vires* of the company.

It is denied by appellants that the contract can be fairly called a lease. But we know of no element of a lease which is wanting in this instrument. "A lease for years is a contract between lessor and lessee, for possession of lands, etc., on the one side, and a recompense by rent or other consideration on the other." 4 Bacon's Abridgment, 632. "Anything corporeal or incorporeal lying in livery or in grant may be the subject-matter of a lease, and, therefore, not only lands and houses, but commons, ways, fisheries, franchises, estovers, annuities, rent charges, and all

other incorporeal hereditaments are included in the common-low rule." Bouvier's Law Dictionary, "Lease;" 1 Washburn Real Property, 310, old paging.

The railroad and all its appurtenances and franchises, including the right to do the business of a railroad and collect the proper tolls, are leased to the plaintiffs for a period of twenty years by the corporation. In return, it receives from plaintiffs one-half of all the gross earnings of the road as rent. The usual right of re-entry for failure to perform covenants in addition to the special right to terminate the lease on notice, is found in the instrument, and the usual covenant for repairs and proper running of the road, equivalent to good husbandry on a farm, is also there. The provision for complete possession, control and use of the property of the company and its franchises by the lessees is perfect. Nothing is left in the lessor but the right to receive rent. No power of control in the management of the road and the exercise of the franchises of the company. A solitary exception to this statement, of no value in the actual control of its affairs, is found in the sixth clause of the lease, which is a covenant that the lessees will discharge any one in their service on the request of the corporation, evidenced by a resolution of the board of directors.

But while we are satisfied that the contract is both technically and in its essential character a lease, we do not see that the decision of that point either way affects the question on which we are to pass. That question is whether the railroad company exceeded its powers in making the contract, by whatever name it may be called, so that it is void.

It is, perhaps, as well to consider this question in the order of its presentation by the learned counsel for plaintiffs, upon whom the burden of showing the error of the circuit court, devolved the duty of proving one the following propositions:

1. The contract was within the powers granted to the railroad company by the act of the New Jersey legislature under which it was organized.

2. That if this be not established, the lease was afterwards ratified and approved by another act of that legislature.

3. That if both these propositions are found to be untenable, the contract became an executed agreement under which the rights acquired by plaintiffs should be legally respected.

The authority to make this lease is placed by counsel primarily in the following language of the thirteenth section of the company's charter: "That it shall be lawful for the said company, at any time during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kinds of goods, produce, merchandise, freight, or passengers, and to enforce the fulfillment of such contracts." This is no more than saying "you may do the business of carrying goods and passengers and may make contracts for doing that business. Such contracts you may make with any other corporation or with individuals." No doubt a contract by which the goods received from other railroads or carrying companies should be carried over the road of this company, or by which goods or passengers from this road should be carried by other railroads, whether connecting immediately with them or not, are within this power, and are probably the main object of the clause. But it is impossible, under any sound rule of construction, to find in the language here used a permission to sell, to lease, or to transfer the entire road and the rights and franchises of the corporation to others. To do so, is to deprive the company of the power of making those contracts which this clause confers and of performing the duties which it implies.

In the case of Ashbury Railway-Carriage and Iron Co. v. Riche, decided in the House of Lords in 1875, and reported in 7 English and Irish Appeal Cases, 653, the memorandum of association, which, as Lord Cairns said, stands under the act of 1862 in place of a legislative charter, thus described the business which the association was authorized to conduct: "The objects for which this company is established are to make, sell, or lend on hire, railway carriages and engines, and all kinds of railway plant, fittings, machinery and rolling stock; and to carry on the business of mechanical engineers and general contractors; to purchase and sell as merchants, timber, coal, metals or other materials; and to buy and sell any such materials on commission or as agents." This company purchased a concession for a railroad in Belgium, and entered into a contract for its construction, on which it paid large sums of money. The company was sued afterwards on the agreement with Riche, the contractor, and the contract was held valid in the Exchequer Chamber by a majority of the judges, on the ground that while it was in excess of the power conferred on the directors by the memorandum, it had been made valid by ratification of the shareholders, to whom it had been submitted. The House of Lords reversed this judgment, holding unanimously that the contract was beyond the powers conferred by the memorandum above recited and being beyond the powers of the association, no vote of the shareholders whatever could make it valid. The case is otherwise important in its relation to the one before us, but it is cited here for its parallelism in the construction of the clause defining the powers of the company.

If a memorandum which described the parties as engaging in furnishing nearly all the materials, machinery and rolling stock which go to make a railroad and its equipments, and then empowered them to carry on the business of mechanical engineers and general contractors, can not authorize a contract to build a railroad, surely the authority to build a railroad and to contract for carrying passengers and goods over its own road and over others is no authority to lease out the road, and with the lease to part with all its powers to another company or to individuals. We do not think there is anything in the language of the charter which authorized the making of this agreement.

It is next insisted, in the language of counsel, that though this may be so, "a corporate body may (as at common law) do any act which is not either expressly or impliedly prohibited by its charter; although where the act is unauthorized by the charter a shareholder may enjoin its execution; and the State may, by proper process, forfeit the charter." We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others.

This class of subjects has received much consideration of late years in the English courts, and counsel on both sides of the present case have relied largely on the decisions of those courts. Among the cases cited by both sides is that of East Anglian Railway Co. v. Eastern Counties Railway Co., 11 C. B. 803. In that case the Eastern Counties Railway Company had made a contract in which, among other things, it covenanted to take a lease of several other railroads whose companies had introduced into Parliament a bill for consolidation under the name of the East Anglian Railway Company, and to assume the payment of the parliamentary expenses of this act of consolidation. This covenant was held void as beyond the power conferred by the charter. "They can not," said the court, "engage in a new trade, because they are incorporated only for the purpose of making and maintaining the Eastern Counties Railway. What additional power do they acquire from the fact that the undertaking may in some way benefit their line? Whatever may be the object or prospect of success, they are still but a corporation for the purpose only of making and maintaining the Eastern Counties Railway; and if they can not embark in new trades because they have only a limited authority, for the same reason they can do nothing not authorized by their act and not within the scope of their authority." This case, decided in 1851, was afterwards cited with approval by the Lord Chancellor in 1857, in delivering the opinion of the House of Lords in the case of Eastern Counties Railway Company v. Hawkes, 5 Clark's House of Lords Reports, 347, and it is there stated that it was also acted on and recognized in the Exchequer Chamber in the case of McGregor v. Deal and Dover Railway Company, 22 L. J., Q. B. 69. Both these cases are cited approvingly in the opinion of Lord Cairns in the case of the Ashbury Company, on appeal in the House of Lords. This latter, as decided in the Exchequer Chamber, L. R. 9 Exch., 224, is much relied on by counsel for plaintiffs here as showing that though the contract may be *ultra vires* when made by the directors, it may be enforced if afterwards ratified by the shareholders or if partly executed. But in the House of Lords, where the case came on appeal, this principle was overruled unanimously in opinions delivered by Lord Chancellor Cairns, Lords Selborne, Chelmsford, Hatherly and O'Hagan, and the broad doctrine established that a contract not within the scope of the powers conferred on the corporation can not be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action.

It would be a waste of time to attempt to examine the American cases on the subject, which are more or less conflicting, but we think we are warranted in saying that this latest decision of the House of Lords represents the decided preponderance of authority, both in this country and in England, and is based upon sound principle.

There is another principle of equal importance and equally conclusive against the validity of this contract, which if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract. That principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void against public policy. This doctrine is asserted with remarkable clearness in the opinion of this court, delivered by Mr. Justice Campbell, in the case of York and Maryland Line Railroad Co. v. Winans, 17 How. 30. The corporation in that case was chartered to build and maintain a railroad in Pennsylvania by the legislature of that State. The stock in it was taken by a Maryland corporation, called the Baltimore and Susquehanna Railroad Company, and the entire management of the road was committed to the Maryland company, which appointed all the officers and agents upon it and furnished the rolling-stock. In reference to this state of things and its effect upon the liability of the Pennsylvania corporation for infringing a patent of the defendant in error, Winans, this court said: "This conclusion (argument) implies that the duties imposed upon plaintiff (in error) by the charter are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But these acts involve an overturn of the relations which the charter has arranged between the legislature and the community. Important franchises were conferred upon the corporation to enable it to provide facilities for communication and intercourse required for public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration for their grant. The corporation

can not absolve itself from the performanee of its obligations without the consent of the legislature. Beman v. Rufford, 1 Simon (N. S.) 550; Winch v. B. & L. R. Co., 13 Law and Equity 506." And in the case of Black v. Delaware and Raritan Canal Co., 7 C. E. Green (N. J. Eq.,) 399, Chancellor Zabriskie says: "It may be considered as settled that a corporation can not lease or alienate any franchise, or any property necessary to perform its obligations and duties to the State, without legislative authority." For this he cites some ten or twelve decided cases in England and in this country.

This brings us to the proposition that the legislature of New Jersey has given her consent by an act which amounts to a ratification of this lease. That act is entitled "A supplement to the act entitled an act to incorporate the Millville and Glassboro R. Co.," approved April 10, 1867; and its only purpose was to regulate the rates at which freight and passengers should be carried. It reads as follows: Be it enacted, etc., "That it shall be unlawful for the directors, lessees, or agents of said railroad, to charge more than three and a half cents per mile for the carrying of passengers, and six cents per ton per mile for the carrying of freight or merchandise of any description, unless a single package, weighing less than one hundred pounds; nor shall more than one-half of the above rate be charged for carrying any fertilizing materials, either in their own cars or cars of other companies running over said railroad: Provided, That nothing contained in this act shall deprive the said railroad company, or its lessees, of the benefits of the provisions of an act entitled 'An act relative to freights and fares on railways in the State,' approved March 4th, 1858, and applicable to all other railroads in this State."

It may be fairly inferred that the legislature knew at the time the statute was passed that plaintiffs were running the road and claiming to do so as lessees of the corporation. It was not important for the purpose of the act to decide whether this was done under a lawful contract or not. No inquiry was probably made as to the terms of that lease, as no information on that subject was needed. The legislature was determined that whoever did run the road and exercise the franchises conferred on the company, and under whatever claim of right this was done, should be bound by the rates of fare established by the act. Hence, without undertaking to decide in whom was the right to the control of the road, language was used which included the directors, lessees, and agents of the railroad. The mention of the lessees no more implies a ratification of the contract of lease than the word "directors" would imply a disapproval of the contract.. It is not by such an incidental use of the word lessees in an effort to make sure that all who collected fares should be bound by the laws, that a contract unauthorized by the charter, and forbidden by public policy, is to be made valid and ratified by the State.

It remains to consider the suggestion that the contract, having been executed, the doctrine of *ultra vires* is inapplicable to the case. There can be no question that, in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred. And in regard to corporations the rule has been well laid down by C. J. Comstock, in Parish v. Wheeler, 22 N. Y. 494, that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it.

But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms. There remains unperformed the covenant to arbitrate with regard to the value of the contract. It is the damages provided for in that clause of the contract that are sued for in this action. Damages for a material part of the contract never performed; damages for the value of a contract which was void. It is not a case of a contract fully executed. The very nature of the suit is to recover damages for its non-performance. As to this it is not an executed contract. Not only so, but it is a contract forbidden by public policy and beyond the power of the defendants to make. Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was nevertheless a rightful act when it was done. Can this performance of a legal duty, a duty both to stockholders of the company and to the public, give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that this can be done is, in our opinion, to hold that any act done under a void contract makes all its parts valid, and that the more you do under a contract forbidden by law the stronger the claim to its enforcement in the courts.

We cannot see that the present case comes within the principle that requires that contracts which, though invalid for want of corporate power, have been fully executed, shall remain as the foundation of rights acquired by the transaction.

We have given this case our best consideration on account of the importance of the principles involved in its decision, and after a full examination of the authorities we can see no error in the action of the Circuit Court and its judgment is, therefore, affirmed.

CONSTRUCTIVE NOTICE.

SLATTERY v. RAFFERTY.

Supreme Court of Illinois,

[Filed at Ottawa, October, 1879.]

S mortgaged to R a piece of property which by mistake was described as being in section 18 instead of 21, and was so recorded. Soon after a brother of S purchased the same property not knowing of the mortgage, and after an examination of the records. The fact of the mortgage was generally known in the community. The brother paid all but $250 of the purchase-money, before he learned of the mortgage from a son of the mortgagee. He afterwards paid S the balance. *Held*, that the circumstances attending the purchase did not amount to constructive notice, and that the facts were not of such a character as to put an honest and ordinarily prudent man on inquiry, but that the purchaser having learned of the existence of the mortgage before paying the balance of the purchase money, he should be held a trustee for the mortgagee to the extent of the amount of the balance.

MULKEY J. delivered the opinion of the court:

A reversal of the decree in this case is urged on the alleged ground that appellant was a purchaser of the premises in question for a valuable consideration without notice of appellee's rights. Appellee on the other hand insists that the circumstances attending appellant's purchase show that he must have had notice of appellee's mortgage or at least that they were of a character to have put an ordinarily prudent person upon such inquiry as would have led to a knowledge of her rights.

The law as applicable to the issue thus raised by the parties to this record is well settled and there is no controversy here with respect to it. If one purchase land of the owner, knowing that the latter has already mortgaged it to another, although by a wrong description, the purchaser will take the land subject to the mortgage. And even if the purchaser have no actual notice of the mortgage having been made by such wrong description, yet if the circumstances attending the transaction are of a character to have put a reasonably prudent man on such inquiry as would by the exercise of reasonable diligence have led to a discovery of the existence of the mortgage, the purchaser will be bound in the same manner as if he had had actual notice. On the other hand if there is nothing in the attending circumstances calculated to put the purchaser on inquiry. further than the fact that the mortgage with such wrong description is upon the records of the county, and has been seen and read by the purchaser, he will hold the land discharged from the mortgage incumbrance.

These simple propositions can only serve as a guide in a general way, as every case of this character must necessarily depend, in a great measure, upon its own circumstances. In the light of the principles which they announce, let us look at the main facts disclosed by the record before us, and upon which the rights of the parties to it must depend.

Edward Slattery, on the second day of January, 1868, mortgaged to appellee the east half of lot one, in sub-division of S. E. qr. section 21 township 12 north range 1 E. By mistake or design of the mortgagor, to whom was entrusted the preparing of the mortgage, the land was described as being in section 18 instead of 21 as it should have been. The mortgage was given to secure a loan of $348.50, for which Slattery executed his promissory note payable the 1st of October following. The mortgage was recorded in the proper office nineteen days after its execution, and no part of the mortgage debt has ever been paid. On the 8th of February, 1870, John Slattery purchased of Edward Slattery, the same premises. and on the same day received a deed therefor. Prior and up to the time of appellant's purchase, the fact of Mrs. Rafferty's having a mortgage on the land was pretty generally known in the neighborhood in which it lies, at least, several witnesses swear to having heard it spoken of among the neighbors. Appellant before purchasing went to the county seat and examined the records of deeds for himself. He swears that he found on record a mortgage on the premises in question, from his brother to Mrs. Rafferty for $125, which he afterwards on inquiry learned from his brother and Webster had been paid; that he did not find on record the mortgage now in question at all, and that he did not otherwise know or hear anything about it, till in the fall or winter after his purchase, when for the first time he was informed by Mike Rafferty there was such a mortgage; that at that time he had already paid all the purchase money, except the last installment of $250, which he paid afterwards.

It further appears that appellant sold the land in question to Erickson before the commencement of this suit, though no conveyance had then been made; yet the evidence clearly shows that Erickson bought with full notice of appellee's equities. His rights therefore must depend solely upon the good faith of appellant's purchase. It further appears from the testimony of appellant that he lived, during the year 1855 in the neighborhood of the land; and that he got pretty well acquainted there and knew the land well, but that since then he has not lived in that neighborhood; and that at the time of his purchase and for a year or two previous he lived where he then was, some ten miles distant; that he and his brother were not intimate, though the latter occasionally came to his house and borrowed money of him; that witness sometimes though seldom visited his brother, but at one time there was a period of five years in which he did not visit him. Whalen, one of appellee's witnesses, who lived within about a mile of the land, swears that John was acquainted in the neighborhood generally, but that he was seldom there, and that in 1868 lived seven or eight miles from his brother Edward. Mrs. Rafferty swears that she did not know very well where John Slattery ever lived. This we believe to be the substance of all the evidence bearing on the question of notice.

It is evident from this summary of the evidence

that the county records contained nothing that could be regarded as constructive notice of the Rafferty mortgage at the time of appellant's purchase, nor is there any pretense for claiming that he had express notice of it. Indeed there is no claim of that kind.

So it only remains to be seen whether the facts above stated were of a character to have put an honest and ordinarily prudent man on such inquiry as would by the exercise of reasonable diligence have led to a discovery of the Rafferty mortgage, or, in other words, whether the circumstances attending appellant's purchase amount to a constructive notice. While the recording laws of the State should not, so far as courts are able to prevent, be permitted to be made an instrument of oppression or fraud, on the one hand, yet a sound and wise policy, on the other hand, demands that they should be rigidly enforced and faithfully executed. The material prosperity of every country depends largely upon the titles of its lands being clear and free from doubt, so that the purchaser can be assured of getting what he bargains and pays for, and that the seller may safely warrant his title without the hazard of having his children stripped of their patrimony, when he is dead and gone, to make good the title which he assured while living.

When the title purchased is clear and good, as appears from the record, mere suspicions that the purchaser may have had notice of some outstanding, unrecorded equity, will not warrant a court in defeating such title of record. To justify the court in doing so, the evidence of an outstanding equity or title must be of such a character as to cause a man of ordinary prudence and experience to suspect there is something wrong with the title which does not appear of record, and also in some manner point out or indicate the means by which the truth of the matter can be ascertained, or in other words, indicate or point out the course or direction of inquiry. And in considering the circumstances attending a transaction of the kind, in order to arrive at the real truth of the matter, the court should not start out with the hypothesis that the purchaser is dishonest and not worthy of credit. But good faith, honesty and fair dealing should be presumed until the contrary appears.

As far back as the case of Moore v. Hunter, 1 Gilm. 317, where after a great lapse of time, it was sought to overturn a purchaser's title by proof of extrinsic facts, tending to show that the purchaser had notice of an outstanding equity, this court said: "That a court of equity ought to be fully convinced by clear and uncontrovertable testimony before they subvert a long standing legal title accompanied by possession. * * * * A doubt must be converted into something like a certainty before a court of justice would be justified in breaking down a regular chain of title." In Pittman v. Sofley, 64 Ill. 155, Sofley had made a deed to Cordelia Teters, a girl he had raised. The understanding was that the deed was not to be used or put on record until after his death. Sofley at the time was seriously ill and the deed was made in apprehension of death and upon the understanding just stated. In violation of this arrangement, Miss Teters in a few months thereafter put the deed on record. Several years elapsed and Sofley took no steps to have the deed canceled. In the meantime Miss Teters married one Ostrander and after the lapse of about five years from the making of the deed, she and her husband conveyed the premises to Pittman. Pending the negotiation between them, and while Pittman was examining the county records to see if the title was right, he was expressly told that there was some trouble about the title; but his informant mentioned no names, nor did he otherwise give him any clue by which he could learn what the trouble was. Under this state of facts Sofley filed a bill to have the two conveyances above mentioned set aside, and there was a decree in the circuit court to that effect. But upon appeal to this court by Pittman, that decree was reversed, and in delivering the judgment in that case we said: "The notice was wholly insufficient. It was only a vague report from one who had no interest in the property and could not affect the purchaser's conscience. It should always be clearly proved and should be of such a character that a disregard of it would be a fraud."

Looking at the case before us in the light of the rule laid down in the cases just cited, what fact or facts do we discover in the evidence calculated to cause an honest, sensible man to suspect that there was anything wrong about the title? If any one informed appellant of the existence of Mrs. Rafferty's mortgage at or before his purchase, it is very clear there is no proof of it in the record. And if there are any facts or circumstances to be found in the record that would justify us in holding that appellant at the time of his purchase had constructive notice of appellee's mortgage, we are unable to discover them. It is said appellant knew the property. That is true, but what of it? It would be a strange doctrine, indeed, to assume that because one might be familiar with the location and character of a piece of land, he therefore knew the condition of its title. Such a position is not in accord with common experience. Another fact relied on is, that appellant once lived in the neighborhood of the land. Yes: but that was some five years before his purchase. As already shown, both at the time of the execution of the mortgage, and making his own purchase, he lived about ten miles distant. But suppose he had lived in the neighborhood of the land all the while, is it to be laid down as an inference of law that every one who lives in the neighborhood of a tract of land shall be presumed to have notice of any and all secret liens that may exist upon it? Surely not. It is said, however, that appellant is the brother of the mortgagor, and therefore he must be presumed to have been informed by him of this mortgage. We are not aware of any authority holding that if one brother purchase land of another, he shall be deemed to have notice of all secret liens that may exist upon the land and be held responsible accordingly. But in effect such a rule seems to be insisted on here—notwithstanding appellant paid a valuable consideration for the land and the

records of the county in which it lies show that the title at the time of his purchase was clear and free from all liens and incumbrances, and notwithstanding the purchaser swears that he neither before or at the time of his purchase had any notice or intimation of the existence of the liens in question, and his testimony in this respect is not contradicted by any one. It is difficult to realize how any one can seriously contend for such a doctrine.

The case in a word or two is this: Here are two brothers, not at all intimate, living some ten miles apart and seldom seeing each other. One owns a little farm of twenty-five acres, with which the other is familiar. The owner, being in straitened circumstances, goes to the other's house and tells him he wants to sell his farm, stating the terms. The latter, not being willing to trust the representations of the other as to the condition of the title, goes and examines the county records for himself, and after satisfying himself that the title is all right, as the record shows, he purchases the farm at the price agreed on, paying the full value therefor, when it subsequently turns out, after the purchase money has all been paid but $250, that there was a secret lien on the land, amounting to several hundred dollars, of which the purchaser swears he had no notice or intimation whatever. In all this, we see nothing to warrant us in holding that appellant bought with notice, either actual, or constructive, of appellee's mortgage.

It appears, as already shown, that in the fall or winter after appellant's purchase and something over two years before he made the last payment of $250, he was expressly informed by Mike Rafferty that his mother had a mortgage on the land in question.

The doctrine is well settled that where a purchaser of land, before payment, has notice of an existing mortgage, which does not appear of record and of which he had no notice at the time of his purchase, he at once, by operation of law, is converted into a trustee, and, as such, holds the land as a trust fund for the payment of the mortgage debt, and should he subsequently pay the purchase money to his grantor, he will do so at his peril, for such payment will not at all relieve him from his liability as trustee, or discharge the land from the trust which the law has fastened upon it for the benefit of the mortgagee. And the same principle applies to a case like the one before us, where only a part of the purchase money has been paid at the time of the notice of the prior incumbrance. Where only a portion of the purchase money is unpaid, and the same does not exceed the amount of the mortgage, the mortgagee will have a lien on the purchased premises to the extent of the unpaid purchase money. So if such purchaser goes on after notice and makes further payment, he, as before stated, will do so at his peril, and the land will not be discharged from the trust.

The doctrine with respect to notice as applicable to cases of this kind, is precisely the same as that already laid down with respect to buying with notice. Where the information is of an indefinite character and does not, in any manner, indicate the means by which the truth of the matter can be ascertained, or in other words, does not point out the direction or course of inquiry, it will not amount to notice either express or constructive. In Preston v. Williams, 81 Ill. 176, where a subsequent purchaser was told that the land had been sold, but by reason of a mistake in the first deed, the record did not show that the land had been sold, this court said: "It was enough that he had notice of a prior conveyance; however defective it might be a court of equity would not let him profit by it." In Rupert v. Mark, 15 Ill. 542, in discussing the doctrine under consideration, it was said: "Whatever is sufficient to put one on inquiry as to the rights of others, is considered legal notice to him of those rights. He is chargeable with knowledge of such facts as might be ascertained by the exercise of ordinary diligence and understanding." To the same effect are the cases of McConnell v. Reed, 4 Scam. 123; Ogden v. Haven, 24 Ill. 59; Morrison v. Kelly, 22 Ill. 624; and in Cox v. Milner, 23 Ill. 476, we said: "Where a party heard of a sale of land before he purchased, from a source entitled to reasonable credit and under circumstances not likely to be forgotten, the court would hold that the duty would devolve upon him, of tracing out the matter and ascertaining its truth." Under these authorities there seems but little reason, if any, to doubt that it was the duty of appellant when he was informed that appellee had a mortgage on the premises to have gone to her and ascertained the truth of his information. It was not the case of a casual remark or floating, indefinite rumor, coming from one who had no interest in the matter. The information was direct and from one having an interest in the matter. His informant was appellee's own son, and had appellant gone to her he would have learned all about her rights in the land.

The case here is not at all like that of Pitman v. Sofley, *supra*. In that case the information was given by one who had no interest in the matter, and in a casual way, and there was nothing whatever in the information that pointed out the road of inquiry. Here it is quite different, the name of the one having the mortgage is given to appellant, thereby directly pointing out the way of inquiry. Instead of going to her and making inquiry as he ought to have done, he falls back on the records and again satisfies himself that his title is all right, and when the $250 note becomes due, pays it. Appellant's conduct after notice is anything but commendable. It shows an utter indifference on his part to the great wrong and outrage which his brother had perpetrated on an ignorant and confiding woman, and for it he must now pay the penalty by having the land in his hands subjected to the payment of the $250 to appellee, with interest thereon from the 8th day of February, 1873, to the time of such payment, at the rate of six per cent. per annum.

In cases of this character, the fact that the record shows that the purchaser has a clear and per-

fect title is no protection to him, when he has notice before payment of a prior just and meritorious claim upon the land. If the purchaser could relieve himself from the liability imposed by the notice, by merely going to the record and verifying what he knew at the time of his purchase, namely, that his title was good and free from all claims as shown by the record, it would amount to a total subversion of the entire doctrine we have been considering, for the very doctrine itself is founded upon the hypothesis that the purchaser has a good title of record. It results from what we have already said that the court below erred in finding that appellant purchased with notice of appellee's rights, and also in charging the land in his hands with the whole of the mortgage debt. The land should have been charged in his hands with the payment of $250 of her claim with interest, as already stated, it being the amount of purchase money paid by him after notice of her rights.

For this error, the decree is reversed and cause remanded for further proceedings not inconsistant with this opinion.

Decree reversed.

NOTE.—In this case the questions decided are all connected with the important subject of *Notice*, as it affects the rights of purchasers of real estate, and subordinates those rights to others in favor of prior purchasers or incumbrancers of the same property. The branches of the subject directly or incidentally touched upon in the opinion, are as follows:

1. The kind and degree of notice by which purchasers may be affected.
2. Actual and constructive notice.
3. Registration of instruments affecting the title.
4. The effect of relationship between grantor and grantee.
5. The effect of notice after purchase but before payment.
6. Purchase with notice of prior equities, from one who purchased without such notice.

1. *The Kind and Degree of Notice by which Purchasers may be Affected.* In the leading English case of LeNeve v. LeNeve, 3 Atk. 646; *s. c.* 1 Ves. Sr. 64, the rule is declared by Lord Hardwicke, which governs the rights of successive purchasers, to be that the taking of a legal estate, after notice of a prior right, makes a person a *mala fide* purchaser. And where this notice or knowledge comes to the purchaser prior to the conveyance, bad faith may be fixed to the transaction when the notice is *constructive* or *implied*, as well as when it is of the higher or more convincing degree known as *actual* or *express* notice. Lamont v. Cheshire, 65 N. Y. 30; Gerson v. Pool, 31 Ark. 85; Colman v. Watson. 54 Ind. 65. In the case of LeNeve v. LeNeve, the purchaser was charged with notice of a prior equity, upon the strength of proof of information communicated to his agent, without any evidence that the agent had communicated the knowledge so acquired to his principal. The effect will be the same whether the prior right be legal or equitable. So long as it is a right that could have been enforced against the grantor, it will subsist in full force and effect against a subsequent purchaser with notice.

With respect to the application of this doctrine to purchasers of real estate, the words *notice* and *knowledge* may be employed as practically synonymous, so long as the latter, and generally more comprehensive term, is understood as relative to the ordinary affairs of life. When the notice is actual, it imparts actual knowledge; when constructive the knowledge is constructive. When either is clearly made out it will suffice to charge the conscience of the purchaser with the duty of respecting the prior right.

2. *Actual and Constructive Notice.*—No two terms in legal phraseology have been more confusedly distinguished than those of *actual notice* and *constructive notice*. There have been attempts to confine the former to such express and positive information as would be directly confirmed by the human senses, while the latter has been extended to every degree of notice which falls short of this sensuous knowledge. These carelessly drawn distinctions may serve the purpose of a case, but when employed to define legal rights and liabilities will not serve to illustrate or explain a general principle. When thus loosely employed, and applied to statutes requiring actual notice to fix liability or preserve rights, they render the statute absurdly protective of fraud; for not only is the degree of knowledge required by this arbitrary test almost impossible of attainment in many instances where it would be desirable, but it is most easily avoided, where ignorance clothes the fraudulent grantee with immunity. The difficulties surrounding this question are only partially relieved by confining actual notice to information, which though falling far short of knowledge, is sufficient to convince the grantee's mind that there is in existence an outstanding equity adverse to the grantor's title. So long as all that class of information or knowledge of collateral facts which should excite inquiry; the possession of available means of knowledge; and circumstances showing that ignorance is the result of negligence, are remanded to the domain of constructive notice, the use of these terms will mislead the student, and give to statutes and rules of the common law a doubtful construction. *Actual notice* should be divided into *express* and *implied*. Wade on Notice, § 5; Dey v. Dunham, 2 Johns. Ch. 182. The first embraces actual knowledge and direct personal information from any one cognizant of the facts. When the information is direct it must be from some one who undertakes to speak advisedly upon the subject. It is not absolutely necessary that he should know all the facts he undertakes to communicate. If the information comes through several hands to the party intending to purchase it will be none the less competent to affect his conscience. Musgrove v. Bonser, 5 Oreg. 313; Hastings v. Cutler, 24 N. H. 481; Barnes v. McClinton, 3 Pa. 67; Rupert v. Marks, 15 Ill. 540: Jackson *ex dem*, etc., v. Burgott, 10 Johns. 457; Cox v. Milliner, 23 Ill. 476; Dunham v. Dey, 15 Johns. 554. In some cases an attempt has been made to limit the rule to the recognition of such information as comes from parties in interest, or those who are personally cognizant of the facts communicated. Rogers v. Hoskins, 14 Ga. 166; Butler v. Stevens, 26 Me. 484; Miller v. Cresson, 5 Watts & S. 284; Woods v. Farmere, 7 Watts, 382; Wilson v. McCullough, 23 Pa. St. 440; Lamont v. Stimson, 5 Wis. 443. But such a limitation is not proper, except so far as it excludes the idle rumors and gossip of those who neither know nor pretend to know, by personal knowledge or hearsay, anything concerning the things of which they speak. Such information as this may safely be disregarded, especially where it is vague and uncertain, and points to no definite source of actual knowledge. *Implied* notice is that kind of actual notice which rests upon presumption or inference which is not absolutely conclusive. In this respect it differs from constructive notice. The inference is one of *fact*, and not of *law*. The value of this distinction is rendered apparent in the construction of a statute requiring actual notice

to charge subsequent purchasers with knowledge of an unrecorded instrument. In Curtis v. Mundy, 3 Metc. 405, the test which was applied was that the notice would be sufficient if it was of such a character that it was fraud in the party to disregard it, though it fell far short of express notice. So in Williamson v. Brown, 15 N. Y. 354, it is laid down that where the information is sufficient to lead a party to knowledge of a prior unrecorded conveyance, a neglect to make the necessary inquiry to acquire such knowledge will leave him charged to the same extent as though he had pursued the inquiry and ascertained the fact. It is simply a question of diligence. The inference is one of fact, and if it can be shown that if the inquiry had been followed out it would not have led to a knowledge of the prior conveyance, the presumption of notice falls to the ground. Proof that the inquiry was followed with a fruitless result, will have the same effect. Hudson v. Warner, 2 H. & G. 415; Jackson v. Van-Valkenburg, 8 Cow. 260; Jolland v. Stainbridge, 3 Ves. 478; Pendleton v. Fay, 2 Paige, 205. But knowledge of facts and circumstances at the time of the purchase, sufficient to enable the purchaser to discover the prior conveyance by diligent inquiry, will enable the jury to infer actual notice, and such inference can not be overcome by proof that as a matter of fact the second purchase was made in ignorance of the first. Jackson v. Burgott, 10 Johns. 462: Peabody v. Fenton, 2 Barb. Ch. 451; Blaidsell v. Stevens, 16 Vt. 179; Parke v. Chadwick, 8 Watts & S. 96; Vaughan v. Tracy, 22 Mo. 415; Parker v. Kane, 4 Wis. 1; Cambridge Valley Bank v. Delano, 48 N. Y. 326; Hanly v. Morse, 32 Me. 287; Beal v. Gordon. 55 Me. 482; Clark v. Bosworth, 51 Me. 528; Grimston v. Carter, 3 Paige, 421. So notice to an agent of the second purchaser will suffice where the law requires actual notice. Jones v. Bamford, 21 Iowa, 217; Musgrove v. Bonser, 5 Oreg. 313. But to have this effect there must be some connection between the agency and the matter respecting which the party is charged with notice. Pringle v. Dunn, 37 Wis. 449; Snyder v. Sponable, 1 Hill, 567.

Constructive Notice is a much abused term. The following definitions and explanations are selected as indicative of the views of eminent jurists: Knowledge imputed by the court, on presumption too strong to be rebutted, that the knowledge must have been communicated. Story's Eq. Jur. § 399. "In its nature no more than evidence of notice, the presumptions of which are so violent that the court will not allow of its being controverted," Eyre, C. B., in Plumb v. Fluitt, 2 Anstr. 432;. "I hold him chargeable with constructive notice, or notice in law, because he had information sufficient to put him upon inquiry." Kent, Ch. in Sterry v. Arden, 1 Johns. Ch. 261. "It is not *prima facie* evidence of actual knowledge of the fact; the presumption of notice when it arises at all being conclusive even against the truth of the fact." Gibson, J., in Weidler v. Farmer's Bank, 11 S. & R. 134. These all leave out of consideration the constructive notice created by statute, as the recording acts. These are not considered, for the reason that the effect of their provisions was not material to the matters under examination where the term was defined. So far as applicable to matters not governed by the statute, the explanation of the rule by Judge Gibson seems the most accurate. In a later edition of Story's Equity Jurisprudence, appears the following remarks on the subject: "This form of expression is applied, indiscriminately, to such notice as is not susceptible of being explained or rebutted, and to that which may be. It seems more appropriate to the former kind of notices. It will then include notice by the registry and notice by *lis pendens*. But such notice as depends upon possession, upon knowledge of an agent, upon facts to put one upon inquiry * * * * although often called constructive notice, is rather implied notice, or presumptive notice, subject to be rebutted or explained. Constructive notice is thus a conclusive presumption, or presumption of law, while implied notice is a presumption of fact." Story's Eq. Jur. § 410 *a*.

3. *Registration of Instruments Affecting the Title.* The doctrine of notice conclusively presumed from the registration of instruments, as applied to this case, may be very briefly disposed of. The record could only impart constructive notice of what it contained. Here it was a correct transcript of the original. Jennings v. Wood, 20 Ohio, 261; Miller v. Bradford, 12 Iowa, 14. As the property described in this instance was not the property intended to be conveyed, the record could have no effect whatever, except upon those who actually saw it, and then only so far as its recitals excited inquiry. To give the record any force and effect whatever would be to found a presumption of fact—that an examination of the record would have put the party upon inquiry, upon a conclusive presumption created by statute, which would have been equally effective against the most conclusive evidence that the party charged with notice never saw the record, or even that he never could have seen it.

4. *The Effect of Relationship between Grantor and Grantee.* It is true that when the *bona fides* of a transfer of property between two persons depends upon a question of notice from one to the other, the relationship subsisting between them is a proper subject of inquiry. Trefts v. King, 18 Pa. St. 157; Ringgold v. Waggoner, 14 Ark. 69. But the mere fact that they are connected by ties of consanguinity can not raise a very strong inference of an understanding between them. Certainly not such an one as courts will permit to control against positive rebutting testimony and much stronger inferences to be drawn from the fact that they were practically strangers, and in their business transactions together treated each other as such.

5. *The Effect of Notice after Purchase but before Payment.* One of the elements in this case, from which the court drew inferences that reflected with unnecessary harshness upon the purchaser, was that with knowledge of the prior mortgage, which knowledge was acquired after the execution of the second conveyance, he paid the balance of the purchase money. Whatever may have been the legal effect of such payment it could furnish no evidence of a wrongful intention. It was quite evident that the second purchaser found himself between two claimants to the same money, and paid it out to the one to whom he thought himself legally indebted. In this, however, he undoubtedly acted upon a mistake of law. The purpose of the notice is as well served where it saves the subsequent purchaser from parting with the purchase price to the grantor who commits the fraud, as when it precedes the execution and delivery of the deed. Ringgold v. Bryon, 3 Md. Ch. 488; Henry v. Raiman, 25 Pa. St. 354. And when there has been a partial payment, as in this case, the unpaid balance would be subject to the rights of the prior purchaser or mortgagor. Hardin v. Harrington, 11 Bush. 867; Haescig v. Brown, 34 Mich. 503; Cass County v. Greene, 66 Mo. 498, 510.

6. *Purchase with Notice of Prior Equities from One who Purchased without such Notice.* One who purchases innocently—that is, with no knowledge of an outstanding equity adverse to his grantor's right to convey, may not only hold the title free from any antecedent secret trusts, but the good faith of his purchase purges the title from all such secret liens, so that he

may convey a like good title to his grantee. To limit the effect of a *bona fide* purchase to the clearing off of antecedent equities, so long as the title remained in such purchaser, would be to deprive the property of a very important element of its value. When by a fruitless suit against the innocent purchaser, the existence of the adverse claim became widely known, and the knowledge might be easily acquired by inquiry, the number of possible purchasers to whom he might sell would be reduced to the few who were imprudent enough to buy without inquiry. Lowther v. Carleton, 2 Atk. 242; Story Eq. Jurisp. § 409; Com. Dig. Chancery, 4 A. 10; Alexander v. Pendleton, 8 Cranch, 462. And when the purchase is made without such notice as will affect the conscience, from a prior purchaser who bought with full knowledge of the adverse right, the effect will be the same. Kennedy v. Daly, 1 Sch. & Lef. 379; Bumpus v. Plattner, 1 Johns. Ch. 213; Jackson v. Given. 8 Johns. 137; Alexander v. Pendleton, 8 Cranch, 462; Jackson v. Henry, 10 Johns. 185; Hawley v. Cramer, 4 Cow. 717; Hardin v. Harrington, 11 Bush, 367. The reason of this rule which is substantially the same whether applied to the original purchaser without notice, his vendee, or to the purchaser whose grantor held the title charged with the antecedent equity by reason of notice, is quite obvious. But the same reason will not apply when, after the title has passed through clean hands, it returns to those tainted with the original fraud. No sooner does the original fraudulent vendee become re-invested with the title than all the infirmities with which it was originally burdened re-attach to it. This merely deprives an innocent purchaser of one possible purchaser which could not materially affect the value of the property in the market. Bovey v. Smith, 1 Ver. 60; Shutt v. Large, 6 Barb. 373; Kennedy v. Daly, 1 Sch. & Lef. 379.

So far as these questions are discussed in the foregoing opinion, the conclusions are, for the most part, in harmony with the authorities herein cited, excepting perhaps in the distinction drawn between *actual* and *constructive* notice. This distinction is not a merely fanciful one, but is demanded by the highest considerations of justice. The fault here found with the confusion of these terms is not only that it mars the symmetry, weakens the force of otherwise ably considered opinions, but it tends to render them untrustworthy guides to the construction of statutes. It may meet the exigencies of a particular case to say that proof of certain facts raises a legal presumption of notice; or that the facts proved amount to constructive, though not to actual notice. But the very same facts may arise under circumstances where their existence would be most persuasive evidence of actual notice, and where constructive notice is excluded by statute. The court is embarrassed by the prior decision which characterizes a controvertible inference of fact as constructive notice, and is forced to equivocate by means of subtle and transparent differentiation, overrule the precedent case, or reject circumstantial evidence altogether. All this difficulty might be avoided by uniformally adhering to the principle that constructive notice will not admit of rebuttal; and that actual notice is a fact to be proved directly or by inference as any other fact, and falls so far short of actual knowledge that it may be proved by evidence showing that the party held a clue to the ultimate fact, which he negligently or fraudulently failed or refused to follow up.

ABSTRACTS OF RECENT DECISIONS.

UNITED STATES CIRCUIT AND DISTRICT COURTS.

CONTEMPT OF COURT—JUROR CONFERRING WITH PARTY TO SUIT—PROCEDURE.—1. Under sec. 725 of the Revised Statutes a juror in a Federal court is guilty of a contempt in corruptly conferring with a party to a suit during the trial, it appearing that the court had expressly forbidden the jury from conversing with any one regarding the case. That he would be guilty of contempt, even if no such directions were given, *semble*. 2. In proceedings for a criminal contempt the answer of the respondent, in so far as it contains statements of facts, must be taken as true. If false the government is remitted to a prosecution for perjury. But the answer must be credible and consistent with itself, and if the respondent states facts which are inconsistent with his avowed purpose and intention, the court will be at liberty to draw its own inferences from the facts stated.—*In re May*. United States District Court, Eastern District of Michigan. From original opinion of BROWN, J. March, 1880.

DEED OF TRUST—ASSIGNMENT FOR BENEFIT OF CREDITORS—ARKANSAS STATUTE.—1. A mortgage or deed of trust in the nature of a mortgage creates a specific lien, and is in effect a security for a debt and not an absolute conveyance of the property; the equitable title remains in the grantor and may be sold or incumbered by him, or seized and sold by his creditors, subject to the prior lien of the mortgage or deed of trust. 2. A voluntary assignment of property by a debtor for the benefit of his creditors does not operate by way of security for the debts or create a lien on the property, but passes the absolute title, legal and equitable, to the assignee for the purpose of raising a fund to pay debts; and as against the assignee and those holding under him, the debtor has no estate or interest in the property legal or equitable which he can convey or incumber, or which his creditors can seize or sell or establish a lien upon, until the purposes of the trust are satisfied. 3. Under sec. 385 of the Revised Statutes of Arkansas an assignee does not acquire title to the property assigned as against attaching creditors of the assignor until he files the inventory and gives the bond required by that section. And until the inventory is filed and bond given the assignee can not lawfully take possession of the property. 4. A deed of assignment which directs the assignee to sell the property—a stock of goods—in the ordinary course of trade at private sale for twelve months, and which in terms or by necessary implication forbids a sale at public auction until after the expiration of that period, is in contravention of sec. 387 of the Revised Statutes and renders the deed void.—*Bartlett v. Feah*. United States Circuit Court, Eastern District of Arkansas. From original opinion of CALDWELL, J. October Term, 1879.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

February Term, 1880.

RAILROAD CORPORATION—PROPERTY ANNEXED TO REALTY—INJUNCTION.—A railroad corporation, organized under the general laws to build and operate

a road, entered on a certain parcel of land and there constructed a track and certain buildings without any objections by the owner of the equity thereof, who was personally cognizant of such entry and construction, and with whom negotiations were entered into with a view of a purchase of the same; but said corporation never filed any written location nor presented any plan nor paid or tendered payment of any damages for land taken, as required by the statute, and thereafter the mortgage of said land the plaintiff in this action foreclosed the mortgage thereon and sold under the power of sale therein to one M, who on the same day reconveyed to the plaintiff. Afterwards said railroad corporation became bankrupt and its assignees in bankruptcy sold at auction all its rolling stock, rails, sleepers, buildings, etc., including those upon the plaintiff's land, which the purchaser thereupon proceeded to take up and remove. Upon a bill in equity praying for an injunction it was *held* that the rails, sleepers, buildings, etc., became annexed to the realty, and that the plaintiff was entitled to an injunction. Opinion by AMES, J.—*Merriam v. Brown.*

MANSLAUGHTER—NEGLIGENCE—SPECIFIC AVERMENT.—Where the defendant, a conductor of a freight train, was indicted for manslaughter, and the charge in the indictment was that the defendant negligently omitted while crossing with his train from the outward track of the road across the inward track to a side track, and again across the inward to the outward track, to send forward any signal whatever to warn the driver of a certain passenger train which the defendant well knew was then due and about to arrive at that part of said railroad, whereby said passenger train collided with the defendant's train, causing the death of a passenger, it was *held*, that the pleader had made the knowledge of the defendant that said particular passenger train was due, an essential and material portion of the description of the acts and conduct of the defendant which went to constitute the negligence charged; and there being no evidence to support the averment of such knowledge, the conviction could not be sustained. Opinion by ENDICOTT, J.—*Com. v. Hartwell.*

ORAL AGREEMENT—SALE OF STOCK WITHIN STATUTE OF FRAUDS.—The defendant, who was desirous of forming a corporation, applied to the plaintiff to take certain shares of the stock of said corporation, and among the inducements to the plaintiff to take the stock the defendant orally agreed that he would purchase the shares at cost (less the interest) at any time that the plaintiff should be desirous to sell them. The plaintiff accordingly subscribed and paid for the shares, and they stood in his name as one of the stockholders for somewhat more than three years, at the end of which time the plaintiff offered to transfer the stock to the defendant, and demanded of him the fulfillment of his promise, but defendant declined to take it. *Held*, that the shares were "goods, wares and merchandise," within the meaning of the statute of frauds, and that the action upon the agreement could not be maintained. Opinion by AMES, J.—*Boardman v. Cutler.*

NEGLIGENCE—LIABILITY OF CITY—WORK NECESSARILY INVOLVING DANGER.—In an action of tort brought to recover for damages alleged to have been caused to the plaintiff's house by the negligence of the defendant city in carrying on certain blasting operations while constructing a sewer through a public street in said city, the plaintiff requested the court to rule that "if defendant or its agents knew that these blasting operations would be dangerous and likely to cause injury to persons or property notwithstanding all the precautions that could be taken, and injury did result from such blasting operations, then the defendant is liable for all damages resulting from accidents incidental to such operations, provided the parties injured were exercising due care." The court refused so to rule, but instructed the jury, not merely that the actual construction of the drain must be performed with reasonable care and skill, but that the amount of care must be commensurate with the dangerous nature of the work; that great care must be taken; that no precaution must be omitted which careful men acquainted with the business ought to exercise in relation to the same. *Held*, that the authority conferred upon municipal corporations or officers to determine where drains shall be built is in the nature of a judicial power involving the exercise of a large discretion, and depending upon considerations affecting the public health; that the fact that the course or route selected will require the blasting of rocks, thereby subjecting the owners and occupants of adjoining houses to risk and inconvenience, though proper to be taken into consideration by the board of aldermen, is not sufficient to invalidate their decision; and that if the board of alderman had a right to say when the sewer should be laid, and if the city in its construction furnished the degree of diligence, care and skill described in the ruling of the presiding judge no private action of tort can be maintained against it. Opinion by AMES, J.—*Murphy v. Lowell.*

SUPREME COURT OF WISCONSIN.

March, 1880.

ATTACHMENT—DAMAGES—LIABILITY OF COUNTY.—1. Whether a county of this State is liable for damages where the district attorney has attached property malfeiously and without probable cause, in behalf of the county, *quære*. 2. For damages resulting from an attachment against property merely wrongful, without averment of malice or want of probable cause, the remedy, in case of a discontinuance of the attachment suit, was that described by secs. 32-34, p. 1476, Tay. St., and not by an independent action, nor by counterclaim in a subsequent action by the county against the attaching debtor. 3. Whether, where the court immediately adjourned after the discontinuance of an attachment suit, in the absence of defendant's attorney, it can still enable the defendant to have his damages assessed in the attachment suit under the statutory provisions above cited, is not here determined; but he has, at least, no other remedy. Affirmed. Opinion by COLE, J.—*Ashland County v. Stahl.*

RAILROAD CROSSING — CONTRIBUTORY NEGLIGENCE.—I. In an action against a railroad company for injuries received by plaintiff from collision with a train while driving his team and wagon across defendant's road, the court can not say, as matter of law, that ordinary care required plaintiff to stop his team and listen for the train; or that trotting his team to within a rod of the track was negligence, even though he knew that the train usually passed the crossing at about that time in the day; but these questions are for the jury. 2. Evidence that by reason of excavations the formation of the land in the vicinity, and the presence of timber near the crossing, it was somewhat difficult for persons near it on the highway to see an approaching train, would support a finding by the jury that a failure to signal the approach of the train (by bell or whistle) was negligence, although such signals were not then

required by statute. 3. Such a finding may be supported by mere negative testimony, notwithstanding positive testimony on defendant's part that signals were given. Urbank v. Railway Co., 47 Wis. 59. Affirmed. Opinion by LYON, J.—*Eilert v. Green Bay, etc. R. Co.*

CRIMINAL LAW—INTOXICATION—INSTRUCTION—DEFENDANT AS WITNESS—POSSESSION OF STOLEN GOODS—CONSTITUTIONAL LAW.—1. In a criminal action it is competent for the accused to show that at or about the time when the crime was committed he was in such a physical condition as to render it improbable that he committed it; and the fact that such condition was caused by intoxication makes no difference in the rule, the intoxication not being set up as a defense. 2. In a criminal action it is in general within the discretion of the court below whether to instruct the jury not to find defendant guilty upon the unsupported testimony of an accomplice; and where that court refuses a new trial, after a verdict founded upon such testimony alone, this court will not reverse the judgment on that ground. 3. A refusal to instruct the jury in a criminal action that "if a witness knowingly and deliberately swear falsely in regard to one material fact, the jury are not bound to believe any of his statements unless corroberated by other proof," is held no error, where there was no evidence showing that any witness in the case had thus sworn. 4. The defendant in a criminal action can not be required as a witness to testify whether he has ever been convicted of an infamous crime which is not charged in the information for the purpose of subjecting him to punishment as for a second offense. 5. The right of a witness in any case to decline answering whether he has been convicted of an infamous offense, on the ground that the answer would tend to degrade him, is personal to such witness, and can not be taken by the party calling him; while the objection that such testimony is not the best evidence of the fact may be taken, specifically, by such party. 6. Mere possession of stolen goods by the accused shortly after the larceny does not raise any legal presumption of his guilt, but is merely a circumstance to be considered by the jury in connection with the other facts in the case. 7. Statutes imposing a greater penalty for a second or third offense of the same character than that imposed for the first offense, do not violate the constitutional provision which forbids putting one twice in jeopardy for the same offense. Judgment reversed. Opinion TAYLOR, J.—*Ingalls v. State.*

SUPREME COURT OF KANSAS.

March Term, 1880.

MANDAMUS—JUDGMENT.—Where a judgment is ambiguous and giving it one construction to which it is fairly open, the plaintiff is not entitled to an execution thereon, and the clerk refuses to issue such execution: *Held*, that the clerk will not be compelled by a writ of *mandamus* to issue such execution. Affirmed. Opinion by VALENTINE, J. All the justices concurring.—*Hall v. Stewart.*

NEGOTIABLE NOTES—INTEREST—NOTICE.—1. In a note otherwise negotiable and containing a promise to pay interest at twelve per cent. after maturity was this stipulation: "If this note is not paid at maturity the same shall bear twelve per cent. interest from date." *Held*, that these stipulations were tantamount to a promise to pay interest from date until paid at twelve per cent., with a proviso that if promptly paid at maturity no interest would be exacted; that they did not destroy the negotiability of the paper nor impart notice to a *bona fide* purchaser for value before maturity, of usury in the inception of the note. Reversed. Opinion by BREWER, J. All the justices concurring.—*Parker v. Plymell.*

PARTNERS—SETTLEMENT—MUTUAL MISTAKE.—Where two partners, C and M, being equal partners, sharing in the profits and losses equally, have a final settlement of their partnership affairs and through a mutual mistake as to the honesty and solvency of a certain firm having funds in its hands belonging to the partnership, which sum this firm was to use in paying certain debts for which M (and possibly the partnership) was liable, the partners settled upon the basis that said firm was honest and solvent, and that said debt had been paid, while in fact the debt had not been paid, and the firm was insolvent, and had converted said funds to its own use, and after the real facts are ascertained, C refuses to make any change in said settlement or to pay M anything, and then M extinguishes said debt by giving his own promissory note with security therefor: which promissory note is received in full payment and satisfaction of said debt; and then M commences an action against C to recover an amount equal to one-half of the funds so converted. *Held*, that M may maintain the action. Affirmed. Opinion by VALENTINE, J. All the justices concurring.—*Clouch v. Moyer.*

REAL ESTATE—MORTGAGE—DEFENSE—HOMESTEAD.—1. In an action brought by the vendor of real estate conveyed by deed of general warranty to foreclose a mortgage given for the purchase money, the vendee and the mortgagor may set up as a defense a failure of the title to the property. Where the relation of husband and wife exists, the separate deed of the former of his homestead conveys no title, and this notwithstanding the wife has never been a resident of the State and has been abandoned by him without cause. 2. Sec. 8 of the chapter concerning descents and distributions which denies to the wife who has never been a resident of the State, any inheritance in lands conveyed by the separate deed of her husband, in no manner affects the question of the validity of the separate deed of the husband to the homestead. Reversed. Opinion by BREWER, J. All the justices concurring.—*Chambers v. Cox.*

COUNTY WARRANTS—PRIORITY OF PAYMENT.—1. Sec. 4 of ch. 36 of the laws of 1876 is unconstitutional and void, because in conflict with sec. 16 of art. 2 of the Constitution of the State, as the subject matter therein contained is not expressed in the title of the act. 2. The district court of Leavenworth county issued a peremptory writ of *mandamus* in 1878 commanding the board of commissioners of that county to issue certain county warrants for the payment of the fees of jurors incurred in the district court of the county. H was the holder of two of these warrants issued and dated October 7th, 1878. At the time the warrants were issued there was not money in the hands of the treasury of Leavenworth county sufficient to pay them. The warrants were duly presented to the treasury for payment Nov. 2, 1878. This was refused and the treasurer certified on the backs thereof "not paid for want of funds," and registered them for payment in a book kept for that purpose. On February 1. 1880, the warrants were again presented to them for payment and payment refused. At the latter presentation the treasurer had in his hands money sufficient to pay them out of the general funds. *Held*, that the warrants were entitled to priority of payment from the funds applicable therefor, and the treasurer failed in his official duty in refusing to make payment

to H, the owner and the holder. Affirmed. Opinion by HORTON, C. J. All the justices concurring.—*Shepherd v. Helmer.*

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

25. A, being a widower with four children and owning a farm, leaves his home and is not heard from by his family, friends or neighbors for more than seven years. A guardian is appointed for the children, who petitions the probate court for leave to sell the farm to support and educate the children. The petition is granted and the farm is sold and the purchaser goes into possession, after which A, the father of the children, returns and claims his land. Who has the the best title, the purchaser or A? H. L. R.

26. A has a judgment on note against B, C and D. B is principal. An execution issues on A's judgment, and is levied on B's land. The land is advertised, and on the day of sale C, one of the securities, bids off the land and takes a certificate in his own name. Remember, the judgment is against B, C and D; all three are legally liable to pay the judgment to A. This happened in Illinois, where we have no statute on the subject, and of course, in its absence, common law governs. Does C take anything by his bid? Is it simply a payment of so much money on his debt? W. Y.

Danville, Illinois.

ANSWERS.

22. [10 Cent. L. J. 298.] As long ago as March, 1849, it was claimed by plaintiff in error in Gibson v. Zimmerman, 13 Mo. 385, that sec. 13, p. 221, R. C. 184, the statute abolishing joint tenancy in lands, also abolished "estates in entirety;" but the court there held that sec. 3, p. 216, Laws of Mo. 1825, the act of 1835, and the similar provision in the Code of 1845, did not abolish the estates known to the common law as "estates by entireties." This was based on the fact that while under that title the survivor took as in joint tenancy, all other characteristics were wanting, and the reasons adduced for abolishing joint tenancy did not apply. Down to and including the statutes of 1855, "conveyances to two or more persons, other than executors and trustees," were declared to create tenancy in common unless expressly providing otherwise. The G. S. 1865, contained the further exception, "or to husband and wife," and this is preserved in the present code, R. S. Mo. sec. 3949, unless it shall be construed by reason of the substitution of "and" for "or to" that estates by entireties are at last abolished in this State. Such a construction seems unreasonable. Our Supreme Court at February Term, 1873, affirmed Gibson v. Zimmerman, *supra;* see Garner v. Jones, 53 Mo. 68; Id. 72, and cases cited. J. D. STRONG.

st. Joseph, Mo.

24. [10 Cent. L. J. 298.] The action of replevin can be maintained for the recovery of the possession of the books of the record. 11 Pick. 492; 21 Pick. 148. The general ownership of property is not necessarily determined in an action of replevin, it is sufficient to show a right to the possession. 18 Ill. 83; 4 Iowa, 557; 5 Ohio, 92. Therefore it seems that in this case the nearest justice of the peace could maintain the action, he having by statute the immediate right of possession. It makes no difference whether a plaintiff has ever had the possession or not, if he has the right of possession. As to this point see 7 Hill, 126. It would seem that the State having the ultimate right to and the general ownership of the property could also maintain an action of replevin.

Mobile, Ala. B. B. BOONE.

CURRENT TOPICS.

Our valuable contemporary, the *Irish Law Times*, continues to be inaccurate in the statements which it makes concerning our reprinting articles from its columns. It does not object to our publishing them, but it complains that we do not give it proper credit for what we take, and in order to illustrate the injustice to it of our alleged mode of dealing, our contemporary strangely enough selects instances where we have given the proper credit and that too in the most prominent manner. Thus in noticing our remarks on the subject in our issue of February 27th, 1880, the *Irish Law Times* of March 20th, starts out in the following manner: "The controversy which we opened with the CENTRAL LAW JOURNAL on Jan. 31, 1880, brings to recollection a circumstance that caused us more amusement than annoyance, in connection with the appropriation by our able transatlantic contemporary of an article from the *Irish Law Times*. We published an article on 'Fixtures' in 10 Ir. L. T. 463, which our contemporary reprinted in its foreign selections without accrediting this Journal with its authorship. Shortly afterwards, the London *Solicitor's Journal* copied from the American reprint of our article, and naturally enough mentioned the CENTRAL LAW JOURNAL as the author; and then the Scottish *Journal of Jurisprudence* (Vol. 21, p. 47), extracted the same matter from the *Solicitor's Journal*, also giving the sole credit to the CENTRAL LAW JOURNAL. *Tulit alter honores.*" Now we have referred to that article on Fixtures and we find that it was not only reprinted in a column of this JOURNAL headed "Foreign Selections," but that at the end of the article is the name of our contemporary as the source whence it was obtained. If any of our readers will examine pages 616 and 692 of the third volume of the CENTRAL LAW JOURNAL they will see that the editor of our contemporary has not verified his citations. If he does not possess a file of the JOURNAL we shall be glad to send him the numbers in question in order to allow him to correct this slight error. Meanwile we wish to assure the *Irish Law Times*, that so far as our system of indexing the name of the writers of articles is concerned, it does not follow because an Irish reader would be unlikely to turn to the table of contents for the information which he would expect to find at the end of the article, that an American reader would be deceived. Ours is the style adopted by the best magazines in this country, as our contemporary will at once see if he can lay his hands in Dublin upon a copy of either *Scribner's* or *Harper's Monthlies*. Our readers are accustomed to this: they look at once to the table of contents for the source of an article. Therefore the acknowledgment is not inadequate, for it is put exactly where it will be first seen. We hope that our contemporaay will let us know whether, under these circumstances we are not absolved from the imputation of unfairness. We desire very much to stand well with our contemporary. There are so many Home Rulers according to all accounts being elected to the English Parliament, and Mr. Parnell has carried away so many dollars from our pockets, that we expect to wake up some morning and find Ireland a Nation, in which event we would not wish her to have any grievances to settle with us.

The case of *Putnam v. Pollard*, in which the Misses Irving and G. P. Putnam's Sons sued Pollard & Moss, to restrain them from publishing a volume consisting of a number of the works of Washington Irving and

also from the use of the title "Irving's Works" on the back of the cover, came before the Supreme Court of New York on the 6th inst. on a motion for a preliminary injunction. It was argued for the motion that the Misses Irving were the owners of the copyrights which had been entered upon the works of Irving, and that the author retains, on the expiration of the statutory copyright, a common law copyright which is not lost by publication nor taken away by the copyright law of Congress; also that the plaintiffs had a trademark right in the title "Irving's Works," and that since 1848, the Putnams had invariably used that title to designate the works of Irving when published in complete sets, and that such title was so known to the trade. The defendants claimed that their publication contained the complete text of the original or early works of Irving, and that the copyright on his works had expired years ago, and that such works were now public property. LAWRENCE, J., denied the motion, saying: "If this application is to be regarded as based upon the legal rights of the plaintiffs or any of them as the owners of copyrights in the works of Washington Irving this court can not afford relief, for the reason that it has no jurisdiction in such cases. Dudley v. Mayhen, 3 Comst. 9; Tomlinson v. Battel, 4 Abb. Pr. 266. If the application is sought to be sustained on the ground that the plaintiffs have a trademark in the words 'Irving's Works,' the affidavits fail to satisfy me that such a claim can be successfully maintained. Indeed, if the reasoning of the learned counsel for the plaintiffs on this motion is sound, the obtaining of a copyright, under the United States statute, is a matter of secondary importance to the establishment to the right to a trademark; and a trademark, once established in an author's name, may enable his representatives for centuries to enjoy the exclusive right to print and publish his works. So far as the application proceeds upon the theory that at common law authors are vested with an exclusive right to print, reprint, publish and vend the productions of an author, and that this right has not not been divested by the statute in relation to copyright, I deem it only necessary to refer to the case of Wheaton v. Peters, 8 Pet. 591. I have read with much interest the able criticism made by the plaintiff's counsel in his brief upon the opinion of the court in that case, but do not see how I can assume to adopt a view in disposing of this motion which is confessedly adverse to the judgment of the Supreme Court of the United States. Finally, as an injunction should only be granted in very clear cases, and as I do not regard this case as falling in that category, I am of the opinion that this motion should be denied, with $10 costs."

RECENT LEGAL LITERATURE.

RECENT DIGESTS.

The time was ripe for a digest of the Kansas decisions. When the reports of a State or of a series exceed in number half a score, the lawyer begins to look around from some means of relieving himself of the labor of consulting ten indexes. In the case of the Kansas decisions the volumes are twenty-eight—the twenty-two of the regular State series, the one of McCahon and Woolworth, and the four of Dillon. The work before us will therefore be appreciated by the profession in the State whose decisions are here brought within the covers of a book of less than 700 pages. We referred last week to some of the difficulties in the way of making a good digest. But in the case before us so many of those obstacles are necessarily absent, that to say that the work can be used with confidence by the profession is not to bestow any particular praise on the compiler. For his work in the premises has been easy. In the first place the volumes to be digested were few; in the second the digesting itself had been already done. By the law of Kansas the *syllabus* of each case is prepared by the court, and is the law of the case, and by the same law the reporter is required to insert this *syllabus* in the reports. The compiler of this volume, then, has simply transferred those *syllabi* from the reports to his digest, as by a modern process a huge oak is removed from the forest and replanted in a garden without the loss of a single limb. "The *syllabus*," says Mr. Dassler in his preface, "is often lengthy, and contains frequently a short statement of the facts of the case; in many instances more than is customary in a digest. We have, however thought proper to insert the same at length, believing that the general benefit to the profession will make amends for any seeming copiousness of matter." Cross references, tables of cases digested, and of cases cited, overruled, etc., a table of contents and the verification of the citations, embrace the compiler's work. This as well as that of the publishers appears to be admirably done.

A digest restricted to the criminal cases of a single State is a novelty in the line of publications of this character. Mr. Busbee has extracted from the eighty-one volumes of the North Carolina reports all the criminal law points adjudicated therein. The result is a volume of 536 small pages, making a digest which will be occasionally referred to by the criminal practitioner regardless of his locality, but which at the same time will be a valuable addition to the library of the lawyer who lives within the boundaries of the State of North Carolina. Nearly 150 pages of the book are devoted to the statutory criminal law of the State.

LAWSON'S CONTRACTS OF COMMON CARRIERS.

The scope of this work is accurately indicated by the title. A glance at the contents given in a foot-note[1] shows the particular subjects which are treated in detail. The writer has examined the volume with much care, and he may add with much interest and profit. The author has wisely confined his Treatise to the practical aspects in which questions relating to the transportation of goods and passengers arise in our day for judicial determination.

In almost all cases, the common law liability is modified or attempted to be by a notice, a receipt or a contract of some kind, and it is the nature and effect of

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Digest of the Decisions of the Supreme Court of Kansas from the earliest period to the year 1879, including the 21st volume of Kansas Reports. By C. F. W. Dassler, of the Leavenworth Bar, editor of "Compiled Laws of Kansas." 1879. Des Moines, Iowa: Mills & Co. 1880.

A Digest of all the Criminal Cases in the North Carolina Reports, from the earliest volume to the eighty-first inclusive, together with the Public Statutes of North Carolina concerning Crimes and Punishments and Criminal Procedure. By F. H. Busbee, of the Raleigh Bar. Raleigh, N. C: Edwards, Broughton & Co. 1880.

A Treatise on the Contracts of Common Carriers, with special reference to such as seek to Limit their Liability at Common Law, by means of Bills of Lading, Express Receipts, Railroad Tickets, Baggage Checks. etc, etc. By John D. Lawson, editor of the CENTRAL LAW JOURNAL. St. Louis: W. H. Stevenson. 1880.

[1] Contents of the Work.—1st. A discussion of the Liabilities of Carriers independent of Contract. 2d. An

these that it is all-important to the practicing lawyer to understand. It is upon these subjects that the law has been so largely developed within the past few years. The judicial history of this growth and development, and the precise condition of the law as it exists to-day, are fully and most admirably presented in this volume. Any lawyer or judge may find here in a hour *data* and results which it would otherwise require days of labor to collect.

The author's style is clear and forcible, and the work has impressed us as having been written in the most painstaking and careful manner. It will be welcomed by the lawyer even in these days of over book-making, as it is, indeed, a valuable addition to the existing treatises on the same general subject.

J. F. D.

NOTES.

——Referring to the articles in No.'s 12 and 13 of this volume on the subject of Option Sales, a leading lawyer of Chicago writes to the author as follows: "I have seen and examined with interest parts I. and II. of your article in the CENTRAL LAW JOURNAL on 'Option Sales.' The subject has evidently received full and patient investigation at your hands, and the article will be of much value to the profession here, where so many such tradings demand the attention of the courts."——One very hot day a case was being tried in a court of law in one of the Western States. The counsel for the plaintiff had been speaking at great length, and after referring to numerous authorities, was about to produce another imposing volume, when the judge inquired what was the amount in dispute. On being informed that it was two dollars, "Well," said he, "the weather is very hot, I am very old, and also feeble—I'll pay the amount myself."

——In a recent case before the Divorce Division of the English Court of Justice, the landlady in whose house a respondent lodged, and who was called to prove his identity by means of a photograph, thus deposed: "I have no doubt it is him, and it isn't like him." The president said: "I have often had to observe on the unsatisfactory character of proof by photographs, and never act on it alone."——An English exchange makes sport of a reporter and a judge at one time. Reports of cases, it says, do not, as a rule, contain any expression of the feelings of the reporter, however open to comment the facts, or sometimes even the law, may be. The possibility, however, of a county court judge taking notes seems to have overcome this habitual self-control in the report of Rhodes v. Liverpool Commercial Investment Company, contained in the December number of the "Law Reports." The headnote begins: "Where at the trial of a cause in a county court the judge *actually* took a note of the evidence." We need give no more of the case. Where such a portentous thing happened, it is evident that anything might follow.

——The harshness and cruelty of the Chinese Penal Code is proverbial. The following may explain the fondness of the Chinaman for immigration to the Pacific slope: "All persons renouncing their country and allegiance or devising the means thereof shall be beheaded, and in the punishment of this offense no distinction shall be made between principal and accessaries. The property of all such criminals shall be confiscated, and their wives and children distributed as slaves to the great officers of State. The parents, grandparents, brothers and grandchildren of such criminals, whether habitually living with them under the same roof or not, shall be perpetually banished to the distance of 2,000 leagues. All those who purposely conceal or connive at this crime shall be strangled. Those who inform against criminals of this class shall be rewarded with the whole of their property. If the crime is contrived but not executed, the principals are to be strangled, and the accessaries punished with blows and banishment." Thus, while he is sojourning in foreign lands, his relatives are hostages for his continuing loyal to the paternal government.

——Judge Lowell's bill for a new bankrupt law has been introduced into the United States Senate by Senator Conkling. A striking feature of the proposed act is the abolition of fees to officials and the substitution of salaries. "The old system of paying registers, assignees and clerks according to the complicated schedule of fees," says the judge in his introduction, "was vexatious, and any schedule is likely to prove so."——No less than 113 lawyers were candidates for seats in the English Parliament at the late elections.——In an article in the *Albany Law Journal* on Professor Parsons, the writer speaks of his legal works as having been particularly successful. "The work on Contracts" he says "has had an exceptionally large sale, the present annual sale, as we are authoritatively informed, far exceeding that of any other legal text-book in any country; and of his Laws of Business Men over 150,000 copies have already been sold by subscription. Besides all this vast amount of work, Professor Parsons executed a most satisfactory and valuable task in writing nearly all the law articles in the first edition of Appleton's Cyclopœdia, which have attracted deserved attention. His legal conclusions are usually correct and worthy to be followed. As an illustration of his accuracy in this regard, even where no written authority appears, we may mention this fact. In the sixth edition of his work on Contracts he briefly gives his views on a question concerning a surety's right, a point on which, at the time, no adjudicated case could be found in the books. A year or two later the precise question came before the Queen's Bench in an important case which was elaborately argued by prominent counsel. In giving judgment, Quain, J. (in the case of Phillips v. Foxall, L. R. 7 Q. B. 677), after stating that he had not been able to find any direct court authority, says, in Parsons on Contracts, vol. 2, p. 31, the rule as to the right to revoke a guaranty is thus given: 'If the guarantee be to indemnify for misconduct of an officer or servant the promise is revocable, provided the circumstances are such that when it is revoked the promisee may dismiss the servant without injury to himself on his failure to provide new and adequate sureties;' and adopted the principle as the law in that case.

Historical Sketch of the Law of Common Carriers. 3d. An Exhaustive and Thorough Statement of the Power of Common Carriers to Make Contracts in the United States and England. 4th. A Discussion of the Policy of Allowing a Limited Liability, including a *symposium* of the Opinions of the Courts *pro.* and *con.* 5th. Notices Limiting Liability and their Effect, as contained in Placards, Bills of Lading, Express Receipts, Railroad and Steamboat Tickets, Checks, Coupons, etc. 6th. Contracts Limiting Liability—Regulations of Carriers—Reasonable and Unreasonable Conditions. 7th. Negligence as Affecting their Contracts; also Delay, Deviation, Abandonment and Misfeasance. 8th. The Construction of Terms in Bills of Lading, Express Receipts and Tickets. 9th. The Case of Free Passes and "Drover" Passes discussed at length. 10th. The Powers and Liability of Agents. 11th. Connecting Carriers. 12th. The Burden of Proof and Evidence. 13th. Unreported Cases on the subject down to the Present Year.